STATE OF MICHIGAN

COURT OF APPEALS

LARRY LONG,

Plaintiff-Appellant,

v

BRIDGEWOOD APARTMENTS, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
January 24, 2006

No. 256593
Wayne Circuit Court
LC No. 03-303990-NI

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant and granting judgment to defendant. Because genuine issues of material fact remain in this premises liability action, we reverse and remand for further proceedings consistent with this opinion.

Plaintiff's first argument is that there are genuine issues of material fact on the question of whether the icy sidewalk on March 5, 2001, created by a long standing defective gutter on the premises during darkness at a point of egress, was an open and obvious danger. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

A premises owner owes no duty to protect or warn against open and obvious hazards. *Lugo v Ameritech Corp*, 464 Mich 512, 516-519; 629 NW2d 384 (2001). This is not an

exception to the duty owed by a possessor of land, but a part of its definition. *Lugo, supra,* p 516. "(W)here the dangers are known to the [entrant onto the land] or are so obvious that the [entrant] might reasonably be expected to discover them, the [possessor of land] owes no duty to protect or warn the [entrant] unless he should anticipate the harm despite knowledge of it on behalf of the [entrant]."[1] *Lugo, supra,* p 516 (internal citation omitted). The test for an open and obvious danger is whether "'an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.'" *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 5; 649 NW2d 392 (2002) quoting *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993).

This action arises out of injuries plaintiff allegedly sustained when he slipped on ice leaving a common area of defendant's premises after attempting to visit his daughter's apartment. Plaintiff's route from his daughter's apartment at the nearest point of egress caused plaintiff to step down from a landing onto the sidewalk in question. Plaintiff had not walked on the sidewalk previously. Because he had first attempted the ground floor patio entrance to his daughter's apartment, his route took him laterally to the landing at the point of ingress. Plaintiff slipped and fell on unnatural ice occasioned by a leaking gutter. The record reflects that the gutter defect had been reported, but, was not repaired. Climatologic data showed no accumulation of ice or snow, and in fact, the prior week of temperatures demonstrated thawing with no snow on the ground. The area was located in darkness because of nonfunctioning lights. Plaintiff stated that he did not know there was ice on the sidewalk until he was lying on it and could not say where he was looking before he fell. Plaintiff also stated that he could not see the icy condition on the sidewalk even after he fell, but could only feel it with his hand.

From the record, we cannot conclude that the icy condition was open and obvious as a matter of law. An average person of ordinary intelligence would not necessarily, on casual inspection, notice a singular patch of ice on a sidewalk solely created by a defective gutter when the outside environmental conditions would not put that average person on notice of the possible existence of icy conditions. Under the facts presented, reasonable minds could differ that an average person of ordinary intelligence would discover the icy sidewalk on casual inspection. *Corey, supra,* p 5.

Plaintiff also argues that the trial court erred in failing to find a genuine issue of material fact on whether plaintiff was an invitee and erred in denying his motion for reconsideration of the summary disposition ruling. In light of the resolution of the open and obvious issue above, review of these issues is unnecessary. *Ewing v Bolden,* 194 Mich App 95, 104; 486 NW2d 96 (1992). On remand the trial court will need to address plaintiff's status of licensee or invitee in accordance with *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 596-597; 614 NW2d 88 (2000).[2] Because the apartment complex comes within the ambit of MCL 554.139(1), the

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[1] We have substituted the bracketed language in the quotation instead of the original text of *Lugo, supra,* for clarity in this opinion.

[2] Plaintiff's status as an entrant onto the land is disputed, but the open and obvious defense will apply regardless. "An invitee is one who enters the land of another for a commercial purpose on an invitation that carries with it an implication that reasonable care has been used to prepare the

(continued…)

trial court will review for applicability, if at all, of the open and obvious doctrine. *O'Donnell v Garasic*, 259 Mich App 569, 580-581; 676 NW2d 213 (2004).

Reversed and remanded for further proceedings in accordance with the opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis

(…continued)

premises and to make them safe." *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2004), see also *Stitt, supra*, p 596-597, 604. "Normally, '[a] landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved.'" *Bragan v Symanzik*, 263 Mich App 324, 329; 687 NW2d 881 (2004), quoting *Stitt, supra*, p 596. A landowner has no duty to safeguard a licensee from an open and obvious danger. *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). A landowner owes a trespasser no duty, except to refrain from injuring him by willful and wanton misconduct. *Id.*, p 145.